NO. 33354

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

Joseph W. Brown,

Plaintiff below and Appellant,

v.

Civil Action No.: 05-C-8

The City of Fairmont, West Virginia; Nick L. Fantasia, individually and as Mayor, City of Fairmont, West Virginia and Chairperson, Board of Trustees City of Fairmont Fireman's Pension and Relief Fund; James Emerick, individually and as Secretary/Treasurer, Board of Trustees, City of Fairmont Pension and Relief Fund; Robert Starn, individually and as Past Secretary/Treasurer, City of Fairmont Fireman's Pension and Relief Fund; Richard Bowers, individually and as Member, City of Fairmont Fireman's Pension and Relief Fund; Bruce McDaniel, individually and as City Manager, City of Fairmont; and Richard Starn, individually and as Fire Chief, City of Fairmont Fireman's Pension and Relief Fund; and Eileen Layman, individually and as Finance Director, City of Fairmont, West Virginia,

Defendants below and Appellees.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE FRED L. FOX II, JUDGE

BRIEF OF APPELLANT, JOSEPH BROWN

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

STATEMENT OF THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The Complaint in this matter was filed with the Circuit Clerk of Marion County, West Virginia, by Joseph W. Brown, the plaintiff below and appellant herein (hereinafter referred to as "Brown"), on or about the 7th day of January, 2005, against the City of Fairmont, West Virginia; Nick L. Fantasia, individually and as Mayor, City of Fairmont, West Virginia and Chairperson, Board of Trustees City of Fairmont Fireman's Pension and Relief Fund; James Emerick, individually and as Secretary/Treasurer, Board of Trustees, City of Fairmont Pension and Relief Fund; Robert Starn, individually and as Past Secretary/Treasurer, Board of Trustees, City of Fairmont Fireman's Pension and Relief Fund; Richard Bowers, individually and as Member, City of Fairmont Fireman's Pension and Relief Fund; Bruce McDaniel, individually and as City Manager, City of Fairmont; and Richard Starn, individually and as Fire Chief, City of Fairmont Fireman's Pension and Relief Fund; and Eileen Layman, individually and as Finance Director, City of Fairmont, West Virginia (hereinafter collectively referred to as "Appellees").[1]

The Complaint asserted claims against the Appellees, including negligence, breach of fiduciary duty, invasion of privacy, outrage/intentional infliction of emotional distress and negligent infliction of emotional distress. The claims arise from the City of Fairmont's payment to Brown's ex-wife, Bonnie L. Brown ("Bonnie Brown"), of monies allocated to her in the parties' 1999 Final Divorce Order and subsequent Qualified Domestic Relations Order ("QDRO") entered on or about April 11, 2001 by the Circuit Court of Marion County. The said monies paid were awarded to Bonnie Brown as her equitable portion of Brown's City of Fairmont Firefighter's Pension Fund

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[1]Prior to filing the Complaint at issue in this appeal, Brown herein filed a Writ of Mandamus with the Circuit Court of Marion County, on or about July 22, 2003. Thereafter, on or about February 3, 2003, the Appellees herein filed a response thereto and prayed that the circuit court dismiss the action. The circuit court then issued an Order Denying in Part, and Granting in Part, Respondents' "Motion to Dismiss", allowing Brown herein to proceed with the majority of counts filed therein. The two actions were consolidated for discovery purposes.

("Pension Fund"). On or about February 21, 2006, the Appellees filed a Motion for Summary Judgment, alleging that the recently decided case Staton v. Staton, 218 W. Va. 201, 624 S.E.2d 548 (2005) was dispositive on the issue of whether the City prematurely paid Bonnie Brown the portion of Brown's pension allocated to her in the 1999 divorce action and subsequent 2001 QDRO. On or about April 5, 2006, Brown filed Plaintiff's Response in Opposition to Respondent, City of Fairmont, West Virginia, et. al.'s Motion for Summary Judgment. On or about April 10, 2006, the Appellees filed a responsive pleading.

By Opinion/Order dated September 26, 2006, the Circuit Court of Marion County granted the Appellees' Motion for Summary Judgment. The circuit court held that the Pension Board's acts were not in error because Brown had met the minimum requirements of fifty (50) years of age and twenty (20) years of service prior to commencement of any payments to Bonnie Brown. The circuit court also found the underlying issue in the Complaint was one of equitable distribution, which should have been handled by addressing the court's previous rulings relating to the parties' divorce action. A copy of the September 26, 2006 Order of the circuit court was previously attached to the Docketing Statement filed herein.

Thereafter, Brown timely filed a Petition for Appeal, on January 26, 2007, and the Appellees filed a Response thereto on February 20, 2007. The Petition for Appeal was by this Honorable Court accepted on April 4, 2007.

The Circuit Court of Marion County committed error by allowing the Appellees to provide a benefit to Bonnie Brown to which she was not entitled under a previous order of that court, and to which she was not entitled under applicable state and federal law. It further failed to acknowledge that the Pension Board neglected to perform its fiduciary duty to Brown and attempted to penalize Brown for its mistakes. It also erred by applying the principles of equitable distribution law to this

matter and by relying upon a footnote in its decision. For these reasons, it is respectfully requested that this Honorable Court reverse the decision of the Circuit Court of Marion County and remand this matter with instructions to reinstate Brown's pension in full according to West Virginia law and, further, to permit Brown to proceed on the entirety his tort based claims.

STATEMENT OF FACTS

Both Brown and the Appellees agree that it is the application of the law to the facts that is at issue in this matter, as the facts relied upon by the circuit court in issuing its ruling are largely undisputed. Brown was employed as a City of Fairmont firefighter from February 16, 1978 until February 15, 2004, when he retired from his employment. During his employment, Brown contributed seven percent (7%) of his annual salary to the City of Fairmont Fireman's Pension Relief Fund, pursuant to West Virginia Code § 8-22-19(b)(4). At the time of the commencement of his employment with the City of Fairmont, Brown was married to Bonnie Brown.

The Browns were separated on or about July 12, 1998, and were divorced by Final Divorce Order of the Circuit Court of Marion County on September 20, 1999. The Final Divorce Order divided the Browns' marital property, including *inter alia* Brown's pension. Brown completed twenty (20) years of service on February 16, 1998. He reached fifty (50) years of age on August 14, 1999. As of the date of the parties' separation, Brown's pension had not vested, as he had not reached the required minimum age of fifty (50). The Final Divorce Order provided for the subsequent entry of a QDRO to divide the pension, with counsel for Bonnie Brown being responsible for the preparation thereof. On February 29, 2000, the circuit court entered an Order to Divide Defendant's Retirement Plan.

On or about January 22, 2001, Kevin Sansalone ("Attorney Sansalone"), attorney for the City of Fairmont, issued a letter to attorneys for both Brown and Bonnie Brown regarding a proposed

QDRO forwarded to the Pension Board for approval. The letter stated that the Pension Board interpreted the proposed QDRO to require a total payment to Bonnie Brown of $14,994.95. Attorney Sansalone further stated that the position of the Pension Board was that the payments should be paid to Bonnie Brown "in 20 installments of $746.46 and 1 payment of $64.85." See Exhibit A to Petition for Appeal.

On April 11, 2001, the Circuit Court of Marion County entered the QDRO *which was approved by the Pension Board.* The Order states in relevant part: "The alternate payee may elect to commence her/his benefits on or after the participant's Earliest Retirement Age as defined by Section 414 (p)(4)(B) of the Code." Additionally, the Order contains a Savings Clause which states in relevant part, the Order is not intended to *"[p]rovide a benefit option not otherwise provided under the terms of the plan."* (Emphasis added).

On May 16, 2001, Robert Starn ("Starn"), City of Fairmont Fireman's Pension Relief Fund Board ("Pension Board") Secretary/Treasurer, informed Brown in writing that the Pension Board would begin payments to Bonnie Brown on June 26, 2001. The letter further stated that Brown was required to make restitution to the Pension Fund for the full amount disbursed to Bonnie Brown. The restitution was to occur either by payroll deduction of forty (40) payments of $373.23 and one (1) payment of $64.85 or by direct monthly payments of $746.46 for twenty (20) months and one (1) payment of $64.85. The letter also stated that the Board "reviewed West Virginia Code § 8-22-19(a) and finds it non applicable, as [Brown had not] severed connection with the department. . . ." See Exhibit B to Petition for Appeal.

On June 5, 2001, Bonnie Watts ("Watts"), Acting Finance Director for the City of Fairmont, commenced payments to Bonnie Brown in the form of twenty (20) payments of $746.46 and one (1) final payment of $64.85. Said payments were issued by Watts pursuant to a letter from Starn

directing the same. At the time that Watts began making payments to Bonnie Brown, Brown was still employed by the City of Fairmont as a firefighter and had not made written application to retire.

On June 13, 2001, Attorney Sansalone issued a letter to Charles A. Shields ("Attorney Shields"), counsel for Brown, advising him that

> [M]r. Brown's failure to maintain his account in accordance with the memo [from Robert Starns] will adversely affect the amount he is entitled to draw at retirement. I have been advised that his failure to timely replace the payments made to the former Mrs. Brown will result in a reduction of his benefits of approximately 1.75% for each biweekly payment made to Mrs. Brown.

See Exhibit C to Petition for Appeal. (Emphasis added).

By letter dated December 5, 2001, Attorney Shields requested documentation pertaining to Brown's contractual rights regarding the retirement account, as well as copies of the minutes of Pension Board meetings for the years 2000 and 2001. The Board failed to provide the requested information to Attorney Shields and, in fact, did not respond at all to the requests. By memo dated December 29, 2001, James R. Emerick ("Emerick"), Secretary/Treasurer for the Pension Board, informed Brown that the payments being made to Bonnie Brown were causing a detrimental effect upon the Pension Fund through a loss of principal and future interest to the Pension Fund. Emerick informed Brown that if money taken out of the Pension Fund is not replaced by Brown, then a reduction in Brown's benefits would take place. Emerick further stated:

> You did not make a reimbursement payment for September, October, November or December, 2001. Each payment has a value of 1.593% toward your retirement pension. Having missed four payments, your retirement pension will be reduced 6.372%. If you leave the Fire Department on 2/16/04, your 75% maximum date, your pension will be calculated at 68.628%. Missing more payments will further reduce your pension.

See Exhibit D to Petition for Appeal.

In a May 29, 2002 letter from Judy Shanholtz ("Attorney Shanholtz"), the attorney who took over representation of Brown, it was requested that the Pension Board provide Brown and his counsel written guidelines for administering the fund and guidelines which defined the repayment requirements set forth in Emerick's December 29, 2001 letter. Further, Attorney Shanholtz provided the Pension Board with a letter from Terasa Robertson ("Robertson"), Contributions Manager of the State of West Virginia Consolidated Public Retirement Board, regarding QDROs under said Pension Fund. Robertson's letter states in part:

> [P]lease be aware that no benefits are payable to an alternate payee until after entry of a QDRO which has been approved by the Board, and that under current law, no benefits are payable to an alternate payee until such time as the member is entitled to payment under the plan, such as at termination of service or retirement.

See Exhibit E to Petition for Appeal. (Emphasis added).

On September 9, 2002, the Circuit Court of Marion County entered an Amended QDRO, which was later vacated by Order dated September 26, 2002, due to the fact that Brown had not been given notice that a modified QDRO was being considered by the court. [2] Prior to entry of the Amended QDRO, Bonnie Brown's counsel presented the Amended QDRO to the Pension Board for approval. The Pension Board did not give Brown notice that they had approved or were even considering a modified QDRO.

By letter to Brown dated December 4, 2002, Emerick, stated:

> If the first QDRO is the final QDRO, your ex-wife was awarded half of your pension contribution as of 7/12/98, $14,994.05. Instead of you getting a loan from a bank, you had the court order the pension fund to pay out this money from your pension account. The pension fund does not make loans. You are required to pay back all

[2] Subsequent to the Amended QDRO being vacated, Bonnie Brown filed a motion asking that the Family Court of Marion County amend the QDRO. This matter is currently stayed by the Family Court pending the outcome of this matter.

> funds that have been withdrawn by you to pay your ex-wife her share of your contributions. We tried to make the pay back plan easier on you by giving a month grace period, and you accepted this plan, and made two payments to the pension fund, then stopped making payments. You were advised that failure to make payments would adversely affect your future pension and how it would do so. The loss of these contributions to the pension fund will adversely affect the pension fund.

See Exhibit F to Petition for Appeal. (Emphasis added).

At all times relevant to this action, the Pension Board did not have written guidelines regarding the procedure to determine whether a domestic relations order qualified and how to distribute funds under a qualified order. Nonetheless, Brown was informed that the Pension Board would hold a meeting on January 7, 2003, to which Brown was invited to address the Pension Board regarding issues related to his pension. On January 7, 2003, Brown, along with Attorney Shanholtz, attended the Pension Board meeting in order to address issues raised in counsel's letter dated May 29, 2002. At said hearing, Brown was informed that the Pension Board had no written guidelines for the Pension Fund other than the guidelines set forth in the West Virginia Code, the Internal Revenue Code, and Employment Retirement Income Security Act ("ERISA").

Between January 7, 2003 and April 4, 2003, the Pension Board conducted private meetings with Bonnie Brown and her counsel directly addressing matters related to Brown's pension rights. Brown was not invited to said meetings, nor was he informed of the outcome thereof.

STANDARD OF REVIEW

The appeal before this Honorable Court results from the Circuit Court of Marion County's grant of summary judgment to the City of Fairmont, et al. Appellate review of a circuit court's entry of summary judgment is *de novo*. Painter v. Peavy, 192 W. Va. 189, 451 S. E. 2d 755 (1994).

POINTS AND AUTHORITIES

I. The Circuit Court Of Marion County Committed Error Because In Failing To Find That The Pension Board's Actions Violated The West Virginia Code And The United States Internal Revenue Code.

West Virginia Code § 8-22-25

58 W. Va. Op. Atty Gen. 185

State ex rel. Fox v. Board of Trustees, 148 W. Va. 369, 135 S.E. 2d 262 (1964)

Booth v. Sims, 193 W. Va. 323, 456 S.E. 2d 167, syl. pt. 7 (1994)

29 U.S.C.A. § 1002 (b)(1)

29 U.S.C.A. § 1002 (32)

6 CCH Guide, Standard Federal Tax Reports, Pension, Etc., Plans § 401, Paragraph 17,502, page 33,854 (2001)

W. Va. Code § 8-22-23

II. The Circuit Court Of Marion Committed Error In Holding Brown, Not The Pension Plan, Responsible For The Pension Board's Lack Of Adherence To State And Federal Law.

Adams v. Ireland, 207 W. Va.1, 528 S.E.2d 197 (1999)

Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988)

W. Va. Code § 8-22-17

26 U.S.C.A. § 414(p)(6)(B)

W. Va. Code § 8-22-25(a)

W. Va. Code § 8-22-19(a)

III. The Circuit Court Of Marion County Committed Error In Failing To Acknowledge That The Pension Board Violated Joe Brown's Due Process Rights And Privacy Rights.

26 U.S.C.A. § 414(p)(6)(A)

Stull v. The Fireman's Pension and Relief Fund of the City of Charleston, 202 W. Va. 440, 504 S.E.2d 903 (1998)

W. Va. Code §§ 8-22-16 through 28

IV. The Circuit Court Of Marion County Committed Error By Interpreting The Complaint To Request Relief Regarding The Allocation Of Marital Assets In The Browns' Final Divorce Order.

W. Va. Code § 48-2-1

Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 (1990)

W. Va. Code § 48-2-32

Roig v. Roig, 178 W. Va. 781, 364 S.E.2d 794, syl. pt. 3 (1987)

McGee v. McGee, 214 W. Va. 36, 585 S.E.2d 36, syl. pt. 3 (2003)

Cross v. Cross, 178 W. Va. 563, 363 S.E.2d 449, syl. pt.5 (1987)

Risoldi v. Risoldi, 320 N.J. Super. 524, 727 A.2d 1038, 1046 (1999)

Bettinger v. Bettinger, 183 W. Va. 528, 396 S.E.2d 709 (1990)

V. The Circuit Court Of Marion County Committed Error By Relying On The Holding In Staton v. Staton, Which Is Inapplicable To This Matter.

Staton, 218 W. Va. 201 at 205, 624 S.E.2d 548 at 552

W. Va. Code § 8-22-23(a)

W. Va. Code § 8-22-24

State ex rel. Fox v. Board of Trustees, 148 W. Va. 369, 135 S.E. 2d 262 (1964)

Hardy v. Hardy, 186 W. Va. 496, 413 S.E.2d 151, syl. pt. 1 (1991)

Huber v. Huber, 200 W. Va. 446, 490 S.E.2d 48, syl. pt. 2 (1997)

VI. The Circuit Court Of Marion County Committed In Granting A Motion Which Relied Solely Upon A Footnote As Its Authority.

Staton v. Staton, [218] W. Va.[201], 624 S.E.2d 548 (2005)

Estate of Tawney v. Columbia Natural Resources, 219 W. Va.266, 633 S.E.2d 22, syl. pt. 6 (2006);

State ex rel. Medical Assurance of W.Va., Inc. v. Recht, 213 W. Va. 457, 583 S.E.2d 80, syl. pt. 13 (2003),

Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290, syl. pt. 2, in part (2001)

Wellman Energy Resources, Inc. v. Energy Resources, Inc., 210 W. Va. 200, 557 S.E. 2d 254 (2001)

ARGUMENT

I. The Circuit Court of Marion County Committed Error In Failing To Find That The Pension Board's Actions Violated The West Virginia Code And The United States Internal Revenue Code.

It is undisputed that, at the time of the Browns' separation, Brown had twenty (20) years of service as a firefighter and was forty-eight (48) years of age. It is also undisputed that, at the time of the parties' separation and continuing until February of 2004, Brown remained actively employed as a firefighter and never made written application to receive his retirement. It is further undisputed that, at the time of the parties' separation, Brown's pension account was not vested since he was not fifty (50) years of age.

Further, the record reflects that the parties agreed that Bonnie Brown was entitled to one-half (½) of the monies accrued in Brown's pension account as of the date of separation and that the value of said pension account was $29,986.10,[3] making Bonnie Brown's one-half (½) portion equal to $14,994.05. Both counsel for Brown and counsel for Bonnie Brown communicated with the City regarding the value of the marital portion of Brown's pension account. A letter was sent to both attorneys from Attorney Sansalone, with the dollar amount set forth to which Bonnie Brown was

[3]This amount reflected the seven-percent (7%) contributed to the pension account by Brown during his employment up until the date of separation.

entitled. See Exhibit C to Petition for Appeal. The figure conveyed to the Browns by the City was contained in the QDRO. The QDRO was drafted by counsel for Bonnie Brown and was approved by the Pension Board, prior to review of the Family Law Master and entry by the circuit court.

The QDRO states: "The alternate payee may elect to commence her/his benefits on or after the participant's Earliest Retirement Age as defined by Section 414 (p)(4)(B) of the [IRS] Code." Additionally, the QDRO contains a Savings Clause which states in relevant part that the order is not intended to *"provide a benefit option not otherwise provided under the terms of the plan."* Despite the fact that the West Virginia Code prohibits distribution of a pension prior to actual severance from employment through retirement (but for the case of disability) and despite the fact that the savings clause in the parties' QDRO prohibited a benefit being paid to Bonnie Brown that was not available to Brown, the City began making monthly payments in the amount specified in the QDRO, to Bonnie Brown prior to Brown's retirement.

West Virginia Code § 8-22-25 states that "[a]ny member of a paid police or fire department who is entitled to a retirement pension hereunder, and who has been in the honorable service of such department for twenty years, may, upon written application to the board of trustees, be retired from all service in such department." The Code further states that the Pension Board "shall authorize the payment of annual retirement pension benefits commencing upon his retirement or upon his attaining the age of fifty years, whichever is later. . . ." W. Va. Code § 8-22-25. (Emphasis added).

Before a fireman's pension fund payments can commence, the employee's departmental service must have ended, his name removed from the payroll, and his name entered on the pension roll. 58 W. Va. Op. Atty Gen. 185. (Emphasis added). This transition can only occur when all requirements for the determination of eligibility for retirement pension have been met and the

employee has ceased employment as a member of a fire department. An employee cannot receive a salary and a retirement pension at the same time. Id.

This Court has held that a right to a pension accrues to or vests in a member "only when all the statutory conditions are performed and all its requirements complied with and satisfied." State ex rel. Fox v. Board of Trustees, 148 W. Va. 369, 135 S.E. 2d 262 (1964) (Emphasis added). Further, in Booth v. Sims, 193 W. Va. 323, 456 S.E. 2d 167, syl. pt. 7 (1994), this Court stated that "[i]f a public employee does not meet age and service requirements for benefits, his or her participation in a state pension plan does not allow receipt of a pension."

Despite the fact that both the City and the circuit court incorrectly applied ERISA to this case, the City's Fireman's Pension Fund is not governed by ERISA, which has an exception for governmental plans. 29 U.S.C.A. § 1002 (b)(1). ERISA defines a governmental plan as a "plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof. . . ." 29 U.S.C.A. § 1002 (32). Rather, the Internal Revenue Code sets the guidelines for the contents of a QDRO and administration of a QDRO, including standards for fiduciary duties of trustees and time frames for distribution of funds.

Further, the Internal Revenue Code regulations, addressing guidelines for administration of QDROs as set forth in part in Committee Reports on P.L. 99-514 (Tax Reform Act of 1986), states:

> [U]nder present law, a domestic relations order is not a qualified domestic relations order (QDRO) if such order requires a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan. . . .
>
> Under the conference agreement, the definition of "various retirement ages" for purposes of the QDRO provisions in the case of the defined contribution plan or a defined benefit plan is the earlier of: (1) the earliest date benefits are payable under the plan to the participants, and (2) the later of the date participant attains the age of 50 and the date on which the participant could obtain a distribution from the plan if the participant separates from service.

> For example, in the case of a plan which **provides for payments of benefits upon separation from service (but not before), the earliest date on which a QDRO can require payments to an alternate payee to begin is the date the participant separates from service.** A QDRO could also require a plan to begin payments to an alternate payee when the participant attains age 50, even if the participant has not been separated from service. The amount payable under a QDRO following the participant's earliest retirement age cannot exceed the amount which the participant is (or would be) entitled to receive at such time. For example, assume that a profit sharing plan provides that a participant may withdraw some, but not all, of the participant's account balance before separation from service. A QDRO may provide for payment to an alternate payee up to the amount which the participant may withdraw.

6 CCH Guide, Standard Federal Tax Reports, Pension, Etc., Plans § 401, Paragraph 17,502, page 33,854 (2001).

In its response to Brown's Petition for Appeal, the Appellees attempt to rely upon the above-quoted Internal Revenue Code section to support their contention that payments made to Bonnie Brown were proper because Brown had attained the age of fifty (50) and had twenty (20) years of service at the time. While it is true that the Internal Revenue Service Code allows for payments to an alternate payee before retirement, it does not mandate the same. The Appellees totally ignore the bold, underlined section above, which clearly states that if the plan does not allow for payment before separation from service, the QDRO cannot allow for payments before separation from service. Since the West Virginia Code prohibits payments until written application is made, it is the precise type of plan that to which the IRS Code hypothetical example is referring. Indeed, in an illustration of proper interpretation of the West Virginia Statutory Pension Plans, such as the plan applicable to the instant matter, Robertson, Contributions Manager for the State of West Virginia Consolidated Public Retirement Board, notified Plan Administrators in writing that "under current law, no benefits are payable to an alternate payee until such time as the member is entitled to payment under the plan. . . ."

Ignoring what the actual law mandates, the Appellees, in their reply to Brown's Petition for Appeal, stated that "the City of Fairmont Fireman's Pension and Relief Fund believed Mrs. Brown had a vested interest in the fund and was entitled to make a claim for her share of the retirement benefits." The Appellees further stated that the members of the Pension Board "[b]elieved that Bonnie Brown had acquired a vested interest in one-half of the retirement plan upon her husband attaining age fifty and serving twenty years. . . ." See Reply of Respondents p. 3. (Emphasis added).

The above statements actually support Brown's position that the Appellees acted improperly in handling this matter. The beliefs of the Pension Board are immaterial. It is the correct application of the law that is relevant. Clearly, the Pension Board acted on their beliefs and not upon the law. The Pension Board itself acknowledged that in a memo to Brown the Fireman's Pension Fund is not required to provide any type or form of benefit, or any other option not otherwise provided for under the plan. See Exhibit C to Petition for Appeal, p. 2. This acknowledgment was based upon advice from the City's attorney in a March 24, 2000 letter which also advises that the Pension Board take immediate steps to adhere to the IRS Code which requires procedures for determining a domestic relations order's qualified status. The Pension Board had benefit of counsel and could have, at any time, consulted with its attorney to determine the proper course of action, instead of acting upon its beliefs.

Further, with regard to rules and regulations as to distribution of funds from the Pension Fund, the West Virginia Code states that "[t]he board of trustees of the policemen's pension and relief fund and the board of trustees of the firemen's pension and relief fund shall make rules and regulations, not inconsistent with the provisions of sections sixteen [§ 8-22-16] through twenty-eight [§ 8-22-28] of this article, for the distribution of the moneys of such funds according to the

qualifications of those to whom any portion of such moneys shall be paid." W. Va. Code § 8-22-23. (Emphasis added).

The law, with regard to the distribution of pension funds, is clear. Although Brown had met the age and years of service requirement, he failed to meet the third statutory requirement, in that he was not retired at the time that the Pension Plan began making monthly payments to Bonnie Brown. Therefore, payments to Bonnie Brown, as the alternate payee, were improper, contrary to law and in violation of the QDRO. As addressed *supra,* the QDRO contained a savings clause prohibiting the Order to provide a benefit option not otherwise provided under the terms of the plan. Since the terms of the plan are clearly dictated by statute, the proper administration of the QDRO would have been to pay Bonnie Brown the money due to her after Brown separated from his employment and began receiving monthly payments himself.

Further, as discussed in Section II, *infra*, the City's premature payment to Bonnie Brown, resulted in a severe reduction in Brown's pension value, all to his detriment. Brown performed dutiful service as a firefighter for the City, with the expectation that the amount of his pension upon retirement would be calculated in accordance with the statute. Regarding the amount of money due to Brown, the West Virginia Code states that:

> [O]n such retirement the board of trustees shall authorize the payment of annual retirement pension benefits commencing upon his retirement or upon his attaining the age of fifty years, whichever is later, payable in twelve monthly installments for each year of the remainder of his life, in an amount equal to sixty percent of such member's average annual salary or compensation received during the three twelve-consecutive-month periods of employment with such department in which such member received his highest salary or compensation while a member of the department, or an amount of five hundred dollars per month, whichever is greater.

W. Va. Code § 8-22-25.

The Appellees have penalized Brown by withholding a percentage of the monthly payments due to him, payments upon which he planned to support himself in his retirement. As such, Brown

is entitled to be made whole with regard to his pension and this Court should remand this matter with instructions for the circuit court to enter an Order mandating full reinstatement of Brown's pension.

II. The Circuit Court of Marion County Committed Error In Holding Brown, Not The Pension Plan, Responsible For The Pension Board's Lack Of Adherence To State And Federal Law.

The following facts are undisputed: (1) In the Final Divorce Decree it was ordered that Brown's pension be divided by QDRO, not by immediate payment over time directly by Brown; (2) The Pension Board reviewed and approved the QDRO prior to entry by the circuit court; (3) The City authorized payments to be made to Bonnie Brown in installments on or about June 5, 2001; (4) At the time payments were commenced to Bonnie Brown, Brown had not made a written application to retire; (5) The QDRO had a savings clause; (6) At all times relevant to this action, the Pension Plan did not have any written guidelines; (7) The Pension Board informed Brown that he would need to begin making monthly payments in the same amount paid out to Bonnie Brown or face a percentage penalty in his retirement; and (8) The record is void of any written offer of a method, other than payback to the plan, to keep Brown's retirement whole. As to this last fact, however, Brown was informed verbally that he could work an extra twenty-one (21) months past when he would have been eligible to retire to keep his pension whole.

The Pension Board has a fiduciary duty to protect the solvency of the Pension Fund. Pursuant to the holding in Booth v. Sims, *supra* "*[t]his court has never imposed a fiduciary duty upon the contributing members of a pension system.* Requiring public employees to protect the future solvency of a pension system is *an unconstitutional shifting of the [State's] [Pension Board's] own burden.*" Booth v. Sims, at syl. pt. 23 (Emphasis added). Further, "[*A*]*ll* employees who contribute to a state pension fund and who have substantially relied to their detriment on specific contribution and benefit schedules have immediate legitimate expectations that rise to the *level of*

constitutionally protected contract property rights. . . ." Id. at syl. pt. 18. (Emphasis added). In fact, this Court has stated: In pension cases:

> [T]here are *two distinct issues of contract: (1) an employee's contract right to collect a pension after statutory eligibility requirements have been met; and (2) an employee's legitimate expectations, also contractual in nature, that the government will not detrimentally alter the pension scheme once the employee has spent sufficient time in the system to have relied to his or her detriment.* The first issue involves whether the employee has remained in government service for such a length of time that he or she can collect benefits; the second issue involves the employee's reliance on promised government benefits after years of government service but before actual retirement age. Pension eligibility and reasonable expectations about the system's benefits are entirely separate issues.

Id. at syl. pt. 6. (Emphasis added). In addition, it is the Pension Board's "obligation to fund pension systems on a sound actuarial basis." Id. at syl. pt. 13. "The funding of any pension program is the [Pension Board's] problem -- not the . . . employees' problem -- and once the legislature establishes a pension program, it must find a way to pay the pensions to all employees who have substantial reliance interests." Id. at syl. pt. 14.

The Booth Court also held that a pension plan may not be detrimentally altered, stating that "[t]he pension rights of *all* current state pension plan members who have substantially relied to their detriment cannot be detrimentally altered at all, and any alterations to keep the trust fund solvent must be directed to the infusion of additional money." Additionally, the Court defined "detrimentally alter" as reducing an existing benefit or raising an employee's contribution level without giving the employee sufficient money to pay the higher contribution. Id. at syl. pt. 19. "Although the legislature may augment pension property rights, the legislature cannot simply reduce a participating employee's pension property rights once it establishes the system unless the employee acquiesces in the change to the pension plan or unless the employee has so few years in the system that he or she has not detrimentally relied on promised pension benefits." Id. at syl. pt. 21. Although

the case at hand deals with detrimental altering of a pension plan by the local pension board, not the legislature as in Booth, the same logic holds true. If the legislature cannot enact statutes that detrimentally alter existing benefits relied upon by pension participants, clearly, the Pension Board does not have the authority to do so either.

This Court addressed the rights of another group of public employees in Adams v. Ireland, 207 W. Va.1, 528 S.E.2d 197 (1999). It held that retired and active state employees who were PERS plan participants had "contractually vested property rights created by the pension statute, and such property rights are enforceable and cannot be impaired or diminished by the State." Adams at syl. pt. 2, [citing Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988)]. The public employees pension plan addressed in Adams v. Ireland was calculated based upon a percentage of the employee's final average salary, which is precisely how the pension at issue in this action is calculated.

In Dadisman v. Moore, this Court stated that a unique contractual relationship between the State and its employees regarding retirement benefits existed. In both Adams and Dadisman, this Court held that a "public employee's rights under the State's statutorily-created pension system are contract rights." Dadisman, 181 W. Va. at 789-90, 384 S.E. 2d 826-27; Adams, 207 W. Va. at 7, 528 S.E. 2d at 203. Most importantly, the Court held that those rights are constitutionally protected by Article III, Section 4 of the Constitution of the State of West Virginia and Article I, Section 10, Clause 1 of the United States Constitution. Id.

The West Virginia Code states that it is the duty of the Pension Board to "discharge their duties with respect to pension and relief funds solely in the interest of the members and members' beneficiaries for the exclusive purpose of providing benefits to members and their beneficiaries and defraying reasonable expenses of administering the fund." W. Va. Code § 8-22-17. Further, a Pension Board has a responsibility to determine whether QDROs submitted to it meet pension

guidelines and, after approval of a QDRO, to administer it according to the Pension Fund's guidelines. 26 U.S.C.A. § 414(p)(6)(B).

With regard to the prerequisites to a firefighter drawing his or her pension, the West Virginia Code states:

> Any member of a paid police or fire department who is entitled to a retirement pension hereunder, and who has been in the honorable service of such department for twenty years, may, upon written application to the board of trustees, be retired from all service in such department without medical examination or disability. On such retirement, the Board of Trustees shall authorize the payment of annual retirement pension benefits commencing upon his retirement or upon his attaining the age of fifty years, whichever is later, payable in twelve monthly installments for each year of the remainder of his life, in an amount equal to sixty percent of such member's average annual salary or compensation received during the three twelve consecutive month periods of employment with such department in which such member received his highest salary or compensation while a member of the department, or an amount of five hundred dollars per month, whichever is greater.

W. Va. Code § 8-22-25(a). (Emphasis added).

Not only had Brown not made application to receive monthly retirement payments at the time that Bonnie Brown was paid as the alternate payee under the QDRO, he was also not entitled to a refund of his actual contributions to the Pension Benefit Fund since he continued his employment relationship with the Fire Department. Therefore, since Brown was not entitled to payment of those funds, neither was Bonnie Brown as alternate payee. W. Va. Code § 8-22-19(a).

The Pension Board clearly violated both state and federal law with regard to its fiduciary duties to administer the pension plan relating to Brown's QDRO. The Pension Board totally lacked the knowledge that ERISA law did not apply to the plan. The Pension Board appeared to have knowledge that West Virginia Code and West Virginia case law governed the plan. However, it did not properly ensure that the QDRO adhered to the law before it approved the same. Because the

Pension Board had the duty to determine whether the Order met the definition of a QDRO, and had a duty to properly administer the QDRO, once entered, it violated the law. Therefore, Brown is entitled to an opinion remanding this matter for further proceeding.

III. The Circuit Court Of Marion County Committed Error In Failing To Acknowledge That The Pension Board Violated Joe Brown's Due Process Rights And Privacy Rights.

It is undisputed that, between January 7, 2003 and April 4, 2003, the Pension Board conducted private meetings with Bonnie Brown and her counsel relevant to matters related to Brown's pension rights and regarding an Amended QDRO. These meetings were conducted without providing Brown with notice or the opportunity to participate in said meetings. The Pension Board, without authorization from Brown, discussed issues relating to Brown's retirement fund with Bonnie Brown, her counsel, and with other firefighters.

It is also undisputed that at the time the conversations between the Pension Board and Bonnie Brown began, Brown had not retired from service with the City of Fairmont. Brown was not made aware of those conversations, nor was his permission sought by the Board to discuss *his* retirement fund. It is also undisputed that following meetings with the Pension Board members, Bonnie Brown submitted an Amended QDRO to the Pension Board, said QDRO not only being approved by the Pension Board, but being entered by the circuit court with no knowledge by Brown. Due to the lack of notice to Brown, the Amended QDRO was vacated by the Family Court of Marion County. In its Reply to Petition for Appeal, the Appellees admit that the modification to the QDRO was made without notice to Brown and that it was set aside by the Family Law Judge on that ground. However, the Appellees state that this fact is "moot on this appeal." See Reply to Petition for Appeal, p. 9. That fact is not "moot on this appeal," but is instead clear evidence of the Pension Board's violation of Brown's due process rights and a violation of its fiduciary responsibilities.

As discussed *supra,* the Appellees in their reply brief do not deny that the Pension Board believed that Bonnie Brown was entitled to more money than was allocated to her in the QDRO, which was previously approved by the Pension Board prior to entry by the circuit court.

In fact, not surprisingly, the amended QDRO afforded Bonnie Brown significantly more benefits than the initial QDRO. As addressed *infra*, the City initiated communication with Bonnie Brown informing her that it felt she was entitled to more money and further advising her to hire an attorney. The Pension Board then approved the amended QDRO drafted by an attorney hired by Bonnie Brown after the Pension Board advised her to do so. At no time was Brown, the employee and pension holder, advised that the Pension Board believed Bonnie Brown was entitled to more money. At no time was Brown, the employee and pension holder, advised to seek counsel to represent him on that matter. And, at no time, did Brown, the employee and pension holder, have any opportunity to be heard on the matter, or even to review the Amended QDRO, prior to submission to the Judge.

The Internal Revenue Code requires notification to the participant of the receipt of a QDRO. Specifically, the Code states:

> In the case of any domestic relations order received by a plan (I) *the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations order*, and (ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

26 U.S.C.A. § 414(p)(6)(A). (Emphasis added).

This Court has held that statutes creating pension and relief funds for municipal employees should be liberally construed in favor of those to be benefitted and that as fund fiduciaries, Boards of Trustees shall discharge their duties solely in the interest of the employees. Stull v. The Fireman's

Pension and Relief Fund of the City of Charleston, 202 W. Va. 440, 504 S.E.2d 903 (1998). "Further, a fireman who is a member of the Fire Department's Pension and Relief Fund created under W. Va. Code §§ 8-22-16 through 28 has a property interest in such Fund that gives rise to "some *procedural due process protection.*" Id. 504 S.E. 2d 908. (Emphasis added).

In the instant action, the Pension Board breached its fiduciary duty to Brown as a participant of the Fund and violated Internal Revenue Code guidelines relating to administration of QDROs. It further violated the law by taking actions clearly to the detriment of Brown, the employee and plan participant, when it held secret meetings and disclosed private information to Bonnie Brown, thus violating Brown's rights. The Pension Board treated Bonnie Brown significantly better than Brown, despite the fact that it owed a duty to Brown, the plan participant.

The Appellees' reply brief asserted that Bonnie Brown had a vested interest in the portion of Brown's pension allocated to her in the parties' divorce action and subsequent QDRO. As addressed, *supra,* controlling law does not support that premise. However, even if Bonnie Brown did have a vested interest in her $14,994.05 portion of the pension, the Pension Board clearly breached its fiduciary duties to Brown, when it discussed matters in excess of those related to the distribution of Bonnie Brown's portion of the pension and when it assisted with the unilateral entry of a subsequent QDRO, all to Brown's detriment. Additionally, the status of Bonnie Brown's pension is immaterial to the Pension Board's lack of notice to Brown of the communications between the Board and Bonnie Brown.

The Pension Board's acts were egregious and contrary to clear prevailing law. The inappropriate acts of the Pension Board have caused financial and psychological harm to the Appellant, who is entitled to a have the matter remanded for further proceedings on his tort claims.

IV. The Circuit Court Of Marion County Committed Error By Interpreting The Complaint To Request Relief Regarding The Allocation Of Marital Assets In The Browns' Final Divorce Order.

In the circuit court's September 26, 2006 Opinion/Order, it stated that "Plaintiff had legal options at his disposal to request alterations to the Court's ruling [in the divorce action] prior to disbursement of Ms. Brown's benefits, nearly two years after the entry of the Final Divorce Order." However, the claims in Brown's Complaint were not based on equitable distribution.

Equitable distribution under W. Va. Code §§ 48-2-1, *et seq.*, is a three-step process. In Whiting v. Whiting, 183 W. Va. 451, 396 S.E.2d 413 (1990), this Court held that "[t]he first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets. The third step is to divide the marital estate between the parties in accordance with the principles contained in W. Va. Code § 48-2-32." With respect to pension benefits, this Court has held with regard to retirement benefits "[t]he burden of proof is upon both parties to present evidence concerning the value thereof for equitable distribution purposes." Roig v. Roig, 178 W. Va. 781, 364 S.E.2d 794, syl. pt. 3 (1987).

The Complaint in this action is void of any reference to error being made by the circuit court in determining the distribution of marital debts and assets in the parties' 1998 divorce action. Brown does not assert that Bonnie Brown was not entitled to one-half of the marital portion of his pension. He further does not assert in his Complaint that Bonnie Brown was not entitled to the entry of a QDRO to effectuate payment from the Pension Board. Nor does he assert that the pension was valued improperly.

Brown does assert that the Pension Board breached various duties owed him by distributing the funds to Bonnie Brown, prior to Brown's retirement, in violation of the West Virginia Code and in violation of the terms of the QDRO as entered by the circuit court. He further asserts that the

Pension Board violated his due process and privacy rights when it had private conversations and clandestine meetings with Bonnie Brown and her counsel to discuss Brown's pension and offer her advice that was detrimental to Brown, who was the actual pension holder.

The record reflects that counsel for both parties received advice from Kevin Sansalone, the attorney for the City of Fairmont, with regard to the value of Bonnie Brown's one-half portion of Brown's non-vested pension at the time of the parties' separation. See Exhibit A to Petition for Appeal. The letter indicated that the Board had determined that Bonnie Brown was entitled to $14,994.05. See id. Brown had no reason to present evidence as to the value of the pension (in accordance with Roig), since he agreed that the pension had been properly valued. Further, Bonnie Brown did not present evidence disputing the value placed upon the pension by the Pension Board and it was Bonnie Brown's attorney who drafted the QDRO reflecting the amount.

Had the Appellees not properly valued the pension, Brown would have been afforded an opportunity to present evidence on the same at his final divorce hearing. It was over two (2) years later when an agent of the Appellees approached Bonnie Brown with the notion that she may be entitled to additional monies from Brown's pension. The Appellees admit that they "[b]elieved that payments made to [Bonnie Brown] were inadequate." See Reply to Petition for Appeal. (Emphasis added). Had the Appellees rejected the QDRO (which they approved prior to entry), or otherwise stated that they thought they had made an error in valuing the pension, Brown would have had remedies available to him at the time, including the presentation of evidence and/or the appeal of the Final Divorce Order.

Addressing the division of pension benefits in a divorce action this Court has stated that:

> When a court is required to divide vested pension rights that have not yet matured as an incident to the equitable distribution of marital property at divorce, the court should be guided in the selection of a method of division by the desirability of disentangling the parties

> from one another as quickly and cleanly as possible. Consequently, a court should look to the following methods of dividing pension rights in this descending order of preference unless peculiar facts and circumstances dictate otherwise: (1) lump sum payment through a cash settlement or offset from other available marital assets; (2) payment over time of the present value of the pension rights at the time of divorce to the non-working spouse; (3) a court order requiring that the non-working spouse share in the benefits on a proportional basis when and if they mature.

McGee v. McGee, 214 W. Va. 36, 585 S.E.2d 36, syl. pt. 3 (2003) [citing Cross v. Cross, 178 W. Va. 563, 363 S.E.2d 449, syl. pt.5 (1987)].

This Court further stated that "the present-value offset distribution method is only appropriate when there are sufficient other marital assets against which to offset the non-pensioner's equitable distribution interest in the pension, or sufficient income available to facilitate a reasonable buy-out of the non-pensioner spouse's interest." McGee, 214 W. Va. at 43, 585 S.E.2d at 43 [quoting Risoldi v. Risoldi, 320 N.J. Super. 524, 727 A.2d 1038, 1046 (1999)].

This Court declined to mandate the method upon which a party's retirement plan is divided and left the discretion upon the lower court to decide on a case-by-case basis. "We hesitate to dictate any specific technique for distributing pension benefits at divorce because each pension plan case presents a different set of problems." Cross, 178 W. Va. at 568, 363 S.E. 2d at 454.

In Bettinger v. Bettinger, 183 W. Va. 528, 396 S.E.2d 709 (1990), this Court looked to its decision in Cross v. Cross, *supra* for guidance, and held, "[w]hile it is advantageous to have the parties disentangle their equitable distribution obligations expeditiously, as we indicated in Cross, this is not a mandatory requirement. Where there are substantial nonliquid assets that are subject to equitable distribution, there may be no other recourse than for a trial court to order installment payments for a spouse's share." Bettinger at syl pt. 6.

The Appellees assert that McGee stands for the premise that the allocation of an interest in a spouse's retirement plan automatically vests the amount allocated. See Reply to Petition for Appeal, p. 8. McGee deals with how to divide a pension account upon dissolution of a marriage. It does not deal with when or how a particular pension or retirement plan vests. As is discussed herein, it is the IRS Code and the West Virginia Code that govern pension plans. In the instant matter, the West Virginia Code is clear as to when a firefighter's pension vests.

The Appellees also contradict themselves, by stating in the second sentence of their Statement of Facts in its Reply Brief that "Mr. Brown's pension fund was not fully vested as of the date the parties separated as he had not reached the required age of fifty." Id. at p. 2. The Appellees do not offer any legal basis for their assertion that an alternate payee can have a vested interest in a pension plan before the employee and pension participant is vested.

Applying the Court's logic in Cross to the factual scenario in the instant case, the circuit court properly ordered the use of the third method of division in Cross, that being deferred distribution. The marital estate simply was not comprised of enough liquid assets to offset the $14,994.05 owed to Bonnie Brown for her one-half (½) portion of the value of Brown's Pension Plan at the time of the parties' separation. Accordingly, the circuit court ordered that a QDRO be entered. The court had the option of using immediate payment over time, that being option two in Cross, but declined to do so.

The circuit court did not make a specific finding in its Final Divorce Order as to the reason it ruled that a the deferred distribution method be used and a QDRO be entered to allocate Bonnie Brown's equitable portion of Brown' pension account. However, a review of the parties' respective financial disclosures, coupled with the reading of McGee, Cross and Bettinger, clearly indicates that the court acted properly in its ruling. Brown was not awarded enough liquid assets in the division

of the marital estate to pay Bonnie Brown the $14,994.05 directly. Nor did Brown possess any separate property that would have allowed him to make a direct lump sum payment to cover that amount. Brown also lacked sufficient income to support himself, pay the monthly alimony awarded to Bonnie Brown and make monthly payments to offset the money which was due to Bonnie Brown for her portion of the pension account.

It is therefore totally illogical for that same court to now rule that the language in the Final Divorce Order was intended to allow immediate payments to Bonnie Brown, with the effect of requiring that Brown make immediate monthly payments of the same amount to the Pension Board as reimbursement of monthly payments to Bonnie Brown. The circuit court ruled that if Brown disagreed with the ruling he should have objected to the same, within the time limits for an appeal of the Final Divorce Order. In fact, Brown would not have been able to file a timely appeal of the divorce order, as the QDRO was not entered until almost two (2) years after the Final Order was entered. Moreover, Brown would not have been aware of any impropriety until he received the plan documents that he requested and never received.

Additionally, the circuit court construed Brown's Complaint to "penalize the Defendants for abiding by the Court's orders." See Final Order, p.13. However, as has been discussed, the Appellees did not comply with the previous Order of the circuit court. By making payments to Bonnie Brown before such benefit was available to Brown, the Appellees violated the savings clause of the QDRO.

The circuit court committed clear error in ruling that this matter was one of equitable distribution and that Brown should have appealed the Final Divorce Order. The underlying Complaint has nothing to do with how the Browns assets and debts were allocated in the equitable distribution during their divorce action. The Final Divorce Order and subsequent QDRO properly

allocated $14,994.05 to Bonnie Brown, thus, there was nothing to appeal. It was the acts of the Pension Board that occurred after the entry of the Final Divorce order and the QDRO, that are at issue in the underlying action. Therefore, the circuit court's reliance on equitable distribution law is clear error and this matter should be remanded to the circuit court with instruction to enter an order consistent with the prevailing law of this state regarding the distribution of fireman's pension.

V. The Circuit Court Of Marion County Committed Error By Relying On The Holding In Staton v. Staton, Which Is Inapplicable To This Matter.

The circuit court, in paragraph 10 of its Order Granting Summary Judgment, drew a direct comparison between the instant action and Staton, stating that both cases involved a determination of a spouse's retirement interest for equitable distribution purposes. In Staton, the sole issue for resolution on appeal was "[w]hether disability pension benefits are separate or marital property." Staton, 218 W. Va. 201 at 205, 624 S.E.2d 548 at 552. During the marriage, Mr. Staton worked for the City of Beckley, West Virginia, as a police officer. Like Mr. Brown, Mr. Staton contributed seven percent (7%) of his salary to his pension. Unlike Brown, Mr. Staton was injured and deemed disabled. Therefore, pursuant to an exception under West Virginia law, Mr. Staton was entitled to draw his pension prior to meeting the normal statutory retirement requirements.

The circuit court committed a significant error in omission by failing to distinguish between the facts in Staton and the facts in the instant action. The West Virginia Code allows for the payment of retirement benefits for injured police officers and firefighters, whether injured in the line of duty or otherwise injured, so long as the employee is deemed disabled by two (2) physicians on staff at either Marshall University or West Virginia University. W. Va. Code § 8-22-23(a), W. Va. Code § 8-22-24. The Code does not require that a disabled member meet the standard eligibility

requirements of age and years of service prior to drawing from his/her pension fund.[4] Thus, the eligibility requirements in the case at hand are totally and completely inapplicable to Staton.

The circuit court also misinterpreted the very footnote relied upon by the Appellees in their summary judgment motion. Footnote 6 states:

> The record revealed that Mr. Staton was employed in another job where his disability was not a factor in his job performance. The date on which Mr. Staton actually retires is not relevant in the determination of retirement benefits subject to equitable distribution. Because Mr. Staton had already met the years of service requirement of receiving retirement benefits, the only relevant question is on what date Mr. Staton would have also met the age component of the retirement pension and been able to draw his retirement. In this way, parties are precluded from working at other jobs indefinitely or electing disability benefits to thwart a spouse's entitlement to retirement benefits.

Staton, 218 W. Va. 201, n.6. (Emphasis added). As is clear, the very footnote that the Appellees rely upon in support of their position provides that there were two (2) components to be met by Mr. Staton. First, when he would have met the age requirement (which he already met) and, secondly, when he would have been able to draw his retirement. Id., 218 W. Va. at 201, n.6. Thus, the Staton court recognized that there are two (2) separate and distinct components, each with different interests, and, therefore, remanded the matter for a determination as to when Mr. Staton would have been eligible to retire. The holding in Staton was consistent with controlling West Virginia law which provides that all statutory requirements must be met prior to any entitlement to receive benefits. State ex rel. Fox v. Board of Trustees, 148 W. Va. 369, 135 S.E. 2d 262 (1964).

Had Mr. Staton continued his employment with the City of Beckley, for instance in a desk job which he was able to perform despite his disability, he would not have been eligible to retire

[4]Even though disabled firefighters do not need to meet the age and years of service requirement in order to begin drawing pension benefits, even under the disability exception, the written notice requirement stills holds. There is simply an additional requirement of determination of disability status.

because he would not have made written application to retire and would not have been removed from the payroll. Regardless, Brown does not dispute the fact that the date of retirement is not relevant to the determination of retirement benefits in a divorce action. In fact, as discussed *supra*, both counsel for Brown and counsel for Bonnie Brown agreed upon the amount of money due to Bonnie Brown based upon the calculations of the City. The date of retirement for Brown was not a determining factor in that calculation, as it was the date of separation that the determining factor.

In Staton, the reason that it was necessary to determine the date that Mr. Staton was eligible to retire was that Ms. Staton was only eligible to receive an equitable portion of Mr. Staton's retirement benefit, not his disability benefit. Instructive is the language in the body of the Staton opinion, which states:

> While it is clear that Mr. Staton is receiving a disability award, it is also clear, based on the arguments of counsel before this Court, that Mr. Staton's disability benefit was capable of conversion to a retirement benefit at some future point in time. Earlier, we recognized the possibility that some cases require apportioning of retirement benefits versus disability benefits. Under this scenario, Mrs. Staton is entitled to an equitable distribution of any monies from the police pension fund that are truly for retirement purposes; however, she is not entitled to a distribution of disability monies. Therefore, the circuit court's determination that the disability award constitutes only separate property is reversed, and remanded with instructions to take any evidence needed to determine at what point in time Mr. Staton was or is able to draw retirement benefits. n6. The lower court should then proceed to determine the net value of the retirement benefits as of the date of the parties' separation. n7. Mrs. Staton is then entitled to an equitable share of those proceeds based on the number of years of the parties' marriage.

Id., 218 W. Va. at 207.

Regarding the classification of disability compensation, the Staton court held:

> Benefits that actually compensate for disability are separate property because such monies are personal to the spouse who receives them. In some cases, benefits will need to be separated into a retirement component and a true disability component, classifying the retirement component as marital property and the disability component as separate property.

Id. at syl. pt. 4. This holding is consistent with the Court's previous holdings concerning personal injury awards in equitable distribution. The Court has deemed personal injury awards as separate property, to the extend that the award if for "pain, suffering, disability, disfigurement, or other debilitation of the mind or body." Id. at syl. pt. 3, [citing Hardy v. Hardy, 186 W. Va. 496, 413 S.E.2d 151, syl. pt. 1 (1991) and Huber v. Huber, 200 W. Va. 446, 490 S.E.2d 48, syl. pt. 2 (1997)].

Unlike Staton, in the instant matter, the circuit court was not being asked to make a determination as to the property interest of a former spouse. The underlying Complaint raises no issue as to what portion of Brown's pension is marital. That issue has already been determined with all parties having counsel to assist and advise on that matter. To the contrary, the issue in the instant matter is when Bonnie Brown should have been able to receive monthly payments of her interest in Brown's pension and whether the Appellees violated their fiduciary responsibilities in both the distribution of funds and communications with Bonnie Brown. Brown had not severed his employment with the City of Fairmont at the time that payments were made. Therefore, the statutory requirements for payment had not been met and the Appellees' actions were contrary to law.

Bonnie Brown was not eligible for payment as an alternate payee, pursuant to regulations in the Internal Revenue Code, *supra*; the West Virginia Code, *supra* and the savings clause of the QDRO, *supra*. Therefore, the circuit court committed reversible error by relying upon the holding in Staton to support summary judgment. That decision should be overruled with instructions to the Circuit court to issue a decision that properly applies prevailing law.

VI. The Circuit Court of Marion County Committed Error In Granting A Motion Which Relied Solely Upon A Footnote As Its Authority.

The Appellees herein based their entire Motion for Summary Judgment on footnote 6 of this Court's opinion in Staton v. Staton, *supra*. The opening sentence in the motion states "[t]he undersigned moves this Court for the granting of a Motion for Summary Judgment in this action upon recently decided West Virginia Supreme Court case of *Staton v. Staton*, [218] W. Va.[201], 624 S.E.2d 548 (2005)." Moreover, in their short memorandum in support of their motion, one section of the Staton opinion, is quoted, that being footnote 6. Interestingly, the motion and supporting brief do not acknowledge that the aforementioned quote is that of a footnote.

After Brown informed the circuit court in his response brief that the sole quote relied upon by the Appellees was that of a footnote, the circuit court, in its own footnote, relied upon the *obiter dicta*, stating:

> Although footnotes are generally not recognized as holdings in a legal opinion, they do reflect the author's inclination and disposition as to the matter being discussed. Additionally, it is not unusual for justices of the Supreme Court of West Virginia to author dissents and/or concurring opinions relating to footnotes within the body of an opinion under consideration. No such dissents or concurrences were filed in Staton, and the obvious conclusion to be drawn is that our Supreme Court, if presented with the issue in this case, might be disposed to rule in accordance with position expressed in footnote 6.

See n.3, Opinion/Order Granting "[Defendant]," the City of Fairmont, West Virginia, et al., Motion for Summary Judgment.

The circuit court relied upon the fact that no dissenting or concurring opinion was filed by any of the Honorable Justices of this Court to stand for the proposition that this particular footnote holds more weight. The circuit court also seems to place its own opinion in place of that of this Court, by making the assumption that this Court ". . . might be disposed to rule in accordance with position expressed in footnote 6." Id.

This Court has held, when it announces new points of law, those points "[w]ill be articulated through syllabus points as required by our state constitution." Estate of Tawney v. Columbia Natural Resources, 219 W. Va.266, 633 S.E.2d 22, syl. pt. 6 (2006); State ex rel. Medical Assurance of W.Va., Inc. v. Recht, 213 W. Va. 457, 583 S.E.2d 80, syl. pt. 13 (2003), [Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290, syl. pt. 2, in part (2001)].

Tawney addressed a certified question relating to oil and gas rights. The Court rejected an argument by defendant Columbia Natural Resources, Inc. that certain language included in the case of Wellman Energy Resources, Inc. v. Energy Resources, Inc., 210 W. Va. 200, 557 S.E. 2d 254 (2001), was included by the Court in support of a point of law articulated in a syllabus point of that opinion. In rejecting this argument, the Court found that the comments relied upon were *dicta* in that they were not necessary to the Court's decision.

Although addressing issues relative to the discoverability of attorney-client privilege information, this Court in Medical Assurance noted:

> "[h]aving set forth above the proper legal standard for determining the discoverability of the documents at issue, we deem it necessary to briefly explain our finding that the circuit court utilized an improper standard in ruling on Respondent's motion to compel. The transcript of the hearing on the motion to compel indicates that the circuit court based its decision to compel the production of the documents at issue on footnote 8 of Honaker v. Mahon, 210 W. Va. 53 at 62, 552 S.E.2d 788 at 797 (2001).

State ex rel. Med. Assur. of W. Va., *supra*. Correcting the application of the improper standard by the circuit court, this Court stated: "If this Court were to create a new exception to attorney-client privilege, it would do so in a syllabus point and not in a footnote. Language in a footnote generally should be considered *obiter dicta* which, by definition, is language "unnecessary to the decision in the case and therefore not precedential." Medical Assurance, 583 S.E. 2d at 94.

It is clear that this Court issues law in syllabus points, not in footnotes. Further, the Court has made it clear of its intent to consider footnotes as *obiter dicta* and, thus, footnotes have no precedential value. The fact that this Court did not issue a dissent or concurrence in a particular case has no impact on its clear opinion regarding the value of a footnote. Therefore, the circuit court committed error in awarding summary judgment in this matter and this matter should be remanded with instructions to enter an order consistent with prevailing West Virginia law.

CONCLUSION

The Appellees have fiduciary responsibilities dictated by both state and federal law. They failed to fulfill those duties and failed to adhere to state and federal laws governing the administration of QDROs, by providing a benefit to Bonnie Brown to which she was not entitled because Brown had not separated from service with the City at the time payments were commenced. The Appellees further engaged in egregious behavior by initiating contact with Bonnie Brown with said contact for the purpose of advising Bonnie Brown to seek counsel to amend the QDRO. The Appellees did not inform Brown of this contact. The Appellees then violated the law by approving the Amended QDRO, without notice to Brown. It was error for the circuit court to fail to find that the Appellees breached their fiduciary duty to the financial detriment of one of their employees and pension holders. Moreover, it was error for the circuit court to find that the allegations by Brown related to the equitable distribution in the parties' divorce and not to the inappropriate actions of the Appellees. Finally, it was error for the circuit court to base its decision in large part upon a footnote, which this Court has held is merely *obiter dicta*. Thus, it is respectfully requested that this Honorable Court remand this matter to the circuit court with instructions to enter an Order consistent with controlling law in the State, reinstating Brown's pension fund in full, and conducting a proceeding on the merits of the remaining issues in the underlying Complaint.

Dated this 4th day of May 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2007, I served the foregoing **Brief of Appellant, Joseph Brown** upon counsel for the Respondents, by hand-delivery as follows:

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